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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICKEY JENKINS,
Petitioner

versus

STATE OF INDIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Trial Court's error in refusing to permit the Defendant to present past habitual sexual practices of the victim as exculpatory evidence violates the Defendant's rights under the Compulsory Process Clause and the Confrontation Clause of the Sixth Amendment.

II. Whether the Trial Court's error in applying the Indiana Rape Shield Statute I.C. 35-37-4-4 to a deceased victim violated the Due Process Clause of the Fourteenth Amendment and the 6th Amendment Right of Cross-Examination.

III. Whether the Trial Court permitting the FBI Supervisor to testify concerning D.N.A. test results, without requiring antecedent testimony of the Technician who actually preformed the test, violated defendant's Constitutional right of

Confrontation and Cross-Examination of the Sixth Amendment.

IV. Whether the Trial Court's error in allowing the introduction of the Defendant's statements after he had informed the police that he no longer wished to speak with them violated the Defendant's Fifth Amendment Right against Self-Incrimination.

LIST OF PARTIES TO PROCEEDINGS

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Citation to Official Decision of the Indiana Supreme Court:

627 N.E.2d 789

Citation to Official Decision of the Indiana Supreme Court denying Petition for Re-Hearing:

627 N.E.2d 789

JURISDICTIONAL GROUNDS FOR WRIT OF CERTIORARI

Date of entry of decision of the Indiana Supreme Court:

December 20, 1993

Date of Entry of Denial of Petition for Re-Hearing:

March 1, 1994

Statutory Provision granting authority to review:

28 U.S.C. § 1257

VERBATIM RECITATION OF PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

I.C. 35-37-4-4

(verbatim reproduction contained in Appendix)

United States Constitution, Amendment V

(verbatim reproduction contained in Appendix)

United States Constitution, Amendment VI

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United States Constitution, Amendment XIV

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STATEMENT OF THE CASE

On September 16, 1991, the body of a young lady was found in a ditch in northern Morgan County. (R. 2906). Numerous injuries were apparent on the victim, and there was blood, hair and a tire track in the gravel roadway. (R. 2906-2910, 2913). Upon raising the shirt of the victim, a bruise in the form of a tire track was observed across the abdomen of the victim. (R. 2918).

After a news broadcast from the scene describing the young lady, the young lady was tentatively identified as Jennie Whitman via a telephone call from her mother, Caroline Whitman. (R. 2929). Detectives Lang and Betts went to the home of the victim in Indianapolis, and interviewed the mother. (R. 2932). The

mother indicated that she had not seen her daughter since the preceding evening. (R. 2933). Caroline Whitman indicated that the victim had fled from her car, and that she assumed that she had gone to see the Defendant and his girlfriend, Alene Kingery since she had indicated a desire to speak with them without Caroline being present. (R. 2935).

Caroline further indicated that a number of telephone calls had occurred during the early morning hours with the defendant concerning her daughter. (R. 2936). In one of the conversations, Caroline indicated that the Defendant had said that he had dropped the victim off at Starvin Marvin, a gas station near the victim's home. (R. 2940).

The Detectives then went to the Defendant's home to interview the Defendant

and Alene Kingery. (R. 2956). During this interview, the Alene indicated that the victim had arrived at her home at approximately 9:30 P.M. and that she and the defendant had dropped the victim off at the Starvin Marvin at approximately 10:30. (R. 2960-2962). Alene further stated that she, the defendant, and Caroline had searched for the victim for a number of hours on the preceding evening and early morning. (R. 2967).

The Detectives then interviewed the Defendant. (R. 2971). The defendant told a story similar to that of Alene. (R. 2972-2976). Detective Lang then inspected the Defendant's vehicle to see if the tire tread matched the bruising that he had observed on the body of the victim. (R. 2981). Upon looking at the car, he observed a reddish substance on the left

rocker panel of the car which he believed to be blood. (R. 2982).

Defendant was then advised of his Miranda rights. (R. 2983). The officers then believed the Defendant to be a suspect. (R. 2984). The defendant consented to a search of his car. (R. 2986). Detective Lang then left the car to speak with the Prosecutor, and at that point the defendant was handcuffed. (R. 2989). While Detective Lang was on the telephone, the defendant indicated to Detective Betts that he no longer wished to talk to the police. (R. 2996).

In the presence of the Defendant, the detectives negotiated a consent to search the home with Alene and her mother. (R.3001). The defendant first objected to the search, but after the police were able to secure permission from Alene and her

mother, he was persuaded to consent. (R. 3001-3003). The search netted a pair of tennis shoes, a baseball cap, and clothes. (R. 3002-3005).

The officers then went to interview additional witnesses with the defendant in the back seat of the car. (R. 3008, 3023). The officers and the defendant had a conversations on a variety of subjects. (R. 3025). Detective Lang finally requested the defendant to decide if he still wished to no longer talk with them. (R. 3026). The defendant then agreed to talk to the police. (R. 3026). The defendant was not re-Mirandized. (R. 3026). The officers then questioned the Defendant about the blood on the car. (R. 3028). The defendant indicated that he believed that the blood had come from when the victim had been helping him fix his car

on the preceding Saturday. (R. 3028).

While investigating an unrelated automobile personal injury accident, the defendant was handcuffed. (R. 3043). The defendant was then transported to the Morgan County Jail where two taped statements were taken from the defendant. (R. 3046-3048).

In interviewing additional witness, the officers learned that the victim had engaged in sexual relationships approximately 72 hours before her death with her boyfriend, Charles Mathews. (R. 3339).

On September 17, 1991, the Court granted a Search Warrant for the defendant's vehicle (R. 6219), and for the defendant's person. (R. 586).

Defendant filed his Offer to Prove Pursuant to I.C. 35-37-4-4, (Appendix p.47-

49) Brief in Support, (Appendix p. 50-71), (see also, Brief of Appellant, Sections V through IX); along with the deposition of Charles Mathews. (R. 832, 1010); (Appendix p. 75). The court, after hearing excluded all evidence of past sexual relationships of the victim except for the specific instance with Mathews which occurred on Thursday. (R. 706); (Appendix p. 72-74).

On February 25, 1992, defendant filed his Motion to Suppress DNA evidence claiming that introduction of the evidence would violated his rights of confrontation and cross-examination. (R. 702A, 4249-4250); (Appendix p. 76-78). The State admitted that the F.B.I. refused to make its technician, who conducted all of the steps of the DNA testing procedure except for the analysis of the results, available to testify at trial. (R. 4254-4255). The

court, after hearing, denied defendant's Motion. (R. 4403); (Appendix p. 79-81); (see also, Brief of Appellant, Sections I through IV).

On March 30, 1992, the trial began. (R. 7). At trial, the State offered the tape statements of the defendant. (R. 8083, 8175). The defendant objected to their introduction on Fifth Amendment grounds. (R. 10390-10391); (Appendix p. 82-83); (see also, Brief of Appellant, Section X). The court, after a hearing out of the presence of the jury admitted the tapes over the objection of the defendant. (R. 8083, 8187); (Appendix p. 82).

During trial the defendant sought to produce evidence of past sexual activity of the victim as exculpatory evidence. (R. 7896-7898). The court refused to admit the testimony. (R. 7898).

During trial, the State offered results of DNA tests. (R. 8672). Defendant objected to such results on the grounds that the failure of the State to present the technician who had conducted the tests violated defendant's rights of confrontation and cross-examination. (R. 8579). The court denied defendant's objections. (R. 8592).

During trial, defendant presented two expert witnesses which disputed the reliability of the DNA testing results (R. 9528-9583, 9190-9271). along with the National Academy of Sciences Report which was critical of the methodology employed by the FBI. (R. 9817-9930). Dr. Mueller testified as to the great controversy in the scientific community on the issue of population genetics. (R. 9873-9883, 9132, 8980). He further testified as to a

potential 2% false positive rate in the DNA testing procedure. (R. 9570).

Dr. Randall Libby testified as to potential errors which could have been made by the technician that the supervisor would not be able to detect after the fact. (R. 9432, 9434-9435). He further testified as to a potential error in the Q-6 semen sample in this case which could only be refuted by the technician who conducted the test. (R. 9526-9527).

At the conclusion of the trial, the jury found the defendant guilty on all counts. (R. 10123). The court then conducted a Habitual Criminal Trial, and the jury found the defendant guilty of being a habitual criminal. (R. 10321).

At sentencing, the court sentenced the defendant on Count I, Murder to a term of sixty (60) years, enhanced by a thirty (30)

year term for being a habitual criminal. (R. 10-11). This term was consecutive to Count IV, Rape, upon which the defendant was given a twenty (20) year term. (R. 10-11).

ARGUMENT

I. WHETHER THE TRIAL COURT'S ERROR IN REFUSING TO PERMIT THE DEFENDANT TO PRESENT PAST HABITUAL SEXUAL PRACTICES OF THE VICTIM AS EXCULPATORY EVIDENCE VIOLATES DEFENDANT'S RIGHTS UNDER THE COMPULSORY PROCESS CLAUSE AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

In this case the defendant sought to introduce evidence that the victim often engaged in consensual sexual activity while partially clothed. (R. 7896-7997). The deposition of Charles Mathews, Exhibit 408, was proffered under I. C. 35-37-4-4 and included his testimony that the victim often had sex while partially or fully clothed. (R. 7950).

It is important to note that the case against the defendant on the charges of Rape and Child Molesting is entirely circumstantial. One of the cornerstones of the state's case on these charges was succinctly stated by the Prosecutor during Final Argument:

> There was no reason for Jennie Whitman's clothes to be the way they were unless, of course, it was forced. (R. 9995). see also R. 7896-7897.

In making such a statement, the State was inviting the jury to make a false assumption; that the victim would not engage in consensual sexual activity unless she disrobed. This was not in fact the case. The only evidence before the court, which the defendant sought to introduce to rebut the erroneous inference, was that the victim did in fact engage in consensual sexual activity while partially clothed.

(R. 7950). To allow the State to invite a false conclusion, and then to allow the State to hide behind the Rape Shield Statute is particularly problematic.

Failure to allow such evidence limited the defendant's rights to present exculpatory evidence. "The history of the accused's right to present a defense, including the right to introduce evidence, 'is the story of the development of the adversary process and the demise of the inquisitorial method." J. Imwinkelried, Exculpatory Evidence, 407 (1990) (citing to Westen, The Compulsory Process Clause 73 Mich. L. Rev 71, 177 (1974). Additionally, the United States Supreme Court has held that the Fourteenth Amendment guarantees of Due Process incorporates the Compulsory Process guarantees of the Sixth Amendment. Washington v. Texas, 388 U.S. 14, 87 S.Ct.

1920, 18 L.Ed.2d. 1019, (1967). In writing for the Court in that decision, Chief Justice Warren further asserted that an accused has a constitutional right to present witnesses to establish a defense, as a part of his compulsory process guarantee. Id. at 19.

The doctrine set forth in Washington, Id., was extended to technically inadmissable hearsay evidence in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d. 297 (1973), when the Court found that although the proffered evidence sought to be admitted did not fit within the state's hearsay doctrine, the testimony was so reliable and crucial that it's exclusion violated the principles of Washington. Further, it found that the right precluded trial judges from mechanistically applying evidentiary rules

to preclude reliable, and vitally necessary defense evidence. Id. at 302-303; see e.g., Rock v. Arkansas, 483 U.S. 44, 97 S.Ct. 37, 107 L.Ed.2d. 2704, (1987).

Although in Washington, 388 U.S. 44, 87 S.Ct. 1920, 18 L.Ed.2d. 1019, (1967), the Court relied on the compulsory process clause as a source for the accused's constitutional right to present evidence, the Court has also used the confrontation clause to support that right. In Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d. 347, (1974), the issue related to evidence of a witness' past juvenile record, something which was considered confidential by state statute. The defendant sought to admit this evidence so show possible bias on the part of the witness. While the Court conceded that the State's interest in maintaining the

confidentiality of juvenile proceedings was legitimate and important, on the facts of the case, the Court concluded that exclusion of the evidence violated the accused's confrontation right, which was paramount, despite the state's lawful interest.

Davis, Id., was reaffirmed by the Court when it decided Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L.Ed.2d. 513, (1988). In Olden, the defense sought to admit evidence supporting its theory that the white complaining witness had fabricated a rape charge against the black defendant to protect her romantic interest with another black man. At trial the evidence had been excluded because of the risk that the jury would improperly reject her testimony because of bias about interracial relationships. The Court found

that exclusion of this testimony was constitutional error, citing to Davis, 415 U.S. 308. Olden, 488 U.S. at 231 .

In Commonwealth v. Appenzeller, 44 Crim. L. Rep. (BNA) 2161 (Pa. Super. Ct., Nov. 2, 1988), withdrawn Jan. 17, 1989, but see, Commonwealth v. Appenzeller, 46 Crim. L. Rep. (BNA) 1104 (Pa. Super. Ct., en banc, Oct. 16, 1989), the court did find that the accused's confrontation right prevailed over the rape shield proscriptions. The court made its decision by finding that the accused's constitutional right to introduce evidence of the young complainant's sexual activity to dispel any improper inference by the jury about her knowledge of sexual matters, was warranted.

Similarly, in State v. Pulizzano, (1988), 148 Wis. 2d 190, 434 N.W.2d 807,

the court utilized Davis, 415 U.S. 308, and accepted the defense argument for admission of this type of evidence, after balancing the policy supporting the Rape Shield Law against the defendant's need for the evidence. Pulizzano, 434 N.W.2d at 812. The court found that the accused should be permitted to conduct "limited inquiry into the prior sexual assault for the purpose of negating the inference that M.D.'s sexual knowledge was gained from the alleged assault by Pulizzano." Id. at 812, in spite of the proscriptions of a Rape Shield Law which were very similar to those of Indiana.

A New Hampshire court ruled in accord with Wisconsin, in State v. Howard, (1981), 121 N.H. 53, 426 A.2d 457, a case involving statutory rape, when it found that the defendant's confrontation right precluded

that judge from automatically barring defense evidence of the sexual knowledge of the complaining witness. In reaching it's decision, the court noted that average jurors would probably assume that a twelve year old girl was sexually innocent, and therefore it was probable that they would believe that unless the offense charged occurred, she would not have this knowledge. Id. at 462.

A similar holding was also made by the court in State v. Jacques, (1989), Me., 558 A.2d 706, where the court noted that the Rape Shield Law and the policy underlying it "must be weighed against the defendant's constitutional right of effective cross examination and to present a proper defense". Id. at 707. The court additionally concluded that it was a matter of constitutional right that "[a]

defendant. . . must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that she could not have fabricated the charge". Id. Furthermore, the court added that "[a] number of jurisdictions have recognized the accused's constitutional right to surmount Rape Shield Law "for the limited purpose of rebutting the jury's natural assumption concerning a child's sexual innocence. . . ". Id.

Finally, the 7th Circuit Court of Appeal recently ruled that the Indiana Rape Shield Statute unconstitutionally violated a defendant's right to present exculpatory evidence in the case of Tague v. Richards, 3 F.2d 1133, (1993). This is the exact same argument presented in this case.

The evidence offered was highly reliable in that the evidence came from the

boyfriend of the victim, a witness adverse to the defendant. Failure of the court to allow the defendant to present exculpatory evidence of this nature violated defendant's constitutional rights, requiring a reversal of his convictions.

II. WHETHER THE TRIAL COURT'S ERROR IN APPLYING THE INDIANA RAPE SHIELD STATUTE TO A DECEASED VICTIM VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS OF THE FOURTEENTH AMENDMENT AND THE CROSS-EXAMINATION RIGHTS OF THE SIXTH AMENDMENT.

In this case, the defendant sought to present evidence of the past sexual history of the victim to rebut the inference that the state of the victim's clothes would be inconsistent with consensual sexual relations. (R. 7896-7898). The Trial Court

ruled such evidence inadmissable. (R. 7898).

Not allowing the defendant the right to present evidence of this nature is particularly troublesome where the exclusion of such evidence is not violative of the underlying premise of the Rape Shield Statute; the protection of the victim while testifying, of embarrassment or harassment, or the fear that the introduction of such evidence would reduce the likelihood that the victim would report such an offense. Stephens v. Morris, 756 F.Supp 1137, (N.D. Ind., 1991). Absent a reasonable rationale for excluding what was extremely probative evidence which tended to rebut an erroneous conclusion, there was no good reason for excluding the evidence. In addition, the refusal to allow this evidence violates the doctrine set down in

ruling precedents of the U. S. Supreme Court which prohibits the barring of relevant, reliable defense evidence under the rubric of technical evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d. 297, (1973).

In Chambers, this court stated:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers at 295.

The right to confront and cross-examine is not absolute and may bow. in the proper case, to other legitimate interests in the criminal trial procedure. Berger v. California, 393 U. S. 314, 89 S. Ct. 540, 21 L. Ed. 508, (1969); Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d.

666, (1990).

However, the denial or significant diminution of this right undermines the integrity of the fact finding processes and requires a close examination of the compelling state interest. Berger v. California; Chambers v. Mississippi.

In this case, there is no compelling state interest to be served in the exclusion of this evidence where the victim is deceased. Not allowing the defendant to present such evidence to rebut an incorrect inference, where there is no countervailing reason to the contrary, violated the Defendant's Due Process Rights of the Fourteenth Amendment and Cross-Examination Rights of the Sixth Amendment.

III. WHETHER THE TRIAL COURT ERROR PERMITTING THE F.B.I. SUPERVISOR TO TESTIFY

CONCERNING DNA TEST RESULTS, WITHOUT REQUIRING ANTECEDENT TESTIMONY OF THE TECHNICIAN WHO ACTUALLY PREFORMED THE TEST, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT OF CONFRONTATION AND CROSS-EXAMINATION GUARANTEED BY THE SIXTH AMENDMENT.

Amendment VI of the U. S. Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him;

The State's failure to present the technician who performed the "hands on" portion of the DNA testing procedure, denied the defendant the right to confront and cross-examine the adverse witness as to the exact methodology used in conducting the tests. The evidence before the court was that the DNA analysis was conducted by

a two person team at the F.B.I. (R. 8724-8735). Technician Rich Deeter, who was not called to testify conducted Sections I-XIV of the protocol, which consisted of the actual manipulation of the samples themselves to produce the autorads. (R. 8724-8735). Supervisory Agent Robert Coffin, who was called as a witness by the State conducted Section XV of the protocol which is a statistical analysis of the DNA testing procedure which was done by Deeter. (R. 8724-8735).

This Court has observed that, " the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012 at 1016, 108 S.Ct 2798 at 2800, 101 L.Ed. 857, (1988). This Court has previously visited the question of the degree to which the

Confrontation Clause requires direct, face-to-face confrontation of a witness. Maryland v. Craig, supra. The right of confrontation:

> (1) insures that the witness will give his statements under oath - thus impressing upon him the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal invention ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green v. California, 399 U.S.149 at 158, 90 S.Ct. 1930 at 1935, 26 L.Ed.2d 489, (1970).

In this case, the Defendant presented evidence that an error by Mr. Deeter may have occurred during the testing procedure with the critical Q6 female specimen. Any number of potential errors might have been committed by Mr. Deeter resulting in the

anomalous Q6 female result. Only Mr. Deeter could be adequately confronted and cross-examined about this test since only he would have knowledge of the exact procedure employed by his in this case, and the likelihood that an error consistent with the Q6 result had occurred.

The State presented no compelling interest in failing to present Mr. Deeter making the rights of the Defendant to adequate confrontation and cross-examination bow to legitimate necessity of the criminal trial procedure. Maryland v. Craig, 110 S. Ct at 3166.

Failure to present the technician who performed the tests deprived the defendant of his rights to confront and cross-examine adverse witnesses, as provided by the State and Federal Constitutions. As such, the court was in error in allowing such

testimony into evidence requiring a reversal on all counts.

IV. WHETHER THE TRIAL COURT'S ERROR IN ALLOWING THE INTRODUCTION OF THE DEFENDANT'S STATEMENT AFTER HE HAD INFORMED THE POLICE THAT HE NO LONGER WISHED TO SPEAK WITH THEM VIOLATED THE DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

Early on in the questioning process, the defendant informed police that he no longer wished to answer any further questions. (R. 6495). A variety of conversations, nevertheless, occurred after the request by the defendant that he no longer wished to talk. All of these conversations and questions with Officers Lang and Betts occurred without them re-

Mirandizing the defendant. (R. 6505-6506).

Several hours thereafter, the defendant was taken to the County Jail at which time taped statements were taken from the defendant after new Miranda warnings. (R. 6505-6506). These statements (exhibits 126 and 128) were played to the jury over defendant's objection. (R. 8083, 8187).

At the time of the original request by the defendant to cease questioning, the defendant was placed in the back of the police car. (R. 6452). He was then transported by the police officers as they made the rounds of their investigation and was asked various questions by the police officers. (R. 6470-6476, 6486). At some time during the process, the conflicting evidence was that the defendant was placed in handcuffs when the officers had to investigate an unrelated traffic accident.

(R. 6487).

In this case, the defendant informed the police that he no longer wished to talk to them. (R. 6495). Shortly thereafter the police were able to persuade him to consent to a search of his residence, (R. 6504-6505) and thereafter were able to get two tape recordings after new Miranda warnings. (R. 6505-6506). These statements (exhibits 126 and 128) were played to the jury over the objection of the defendant. (R. 8083, 8187).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, (1966),

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to of during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of

compulsion, subtle or otherwise.

Miranda, 384 U.S. at 473.

The extent to which the right continues is judged upon a standard of whether his exercise of the right has been "scrupulously honored". A simple review of the actions of the officers in this case shows that they, by subtrafuge, indirect coercion, and questioning, were able to convince the defendant to allow them to resume questioning. These actions do not rise to the level of a "scrupulously honored" right making the introduction of the statements a violation of Defendant's Fifth Amendment rights.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests this Court to grant Certiorari to decide the important

Federal Questions presented, and to clarify conflicting decisions of the lower courts.

Respectfully submitted,

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